

JS 44 (Rev. 02/19)

**CIVIL COVER SHEET**

County in which action arose: \_\_\_\_\_

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

BARBARA J. SWAAB

**DEFENDANTS**

CALM.COM, INC.

(b) County of Residence of First Listed Plaintiff Oakland  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant San Francisco  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Arnold S. Weintraub (P22127) (248) 809-2005

The Weintraub Group, P.L.C.

24901 Northwestern Hwy., Suite 311, Southfield, Mi 48075

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input checked="" type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding    ☐ 2 Removed from State Court    ☐ 3 Remanded from Appellate Court    ☐ 4 Reinstated or Reopened    ☐ 5 Transferred from Another District (specify)    ☐ 6 Multidistrict Litigation - Transfer    ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. 2201; 15 U.S.C. 1114; 15 U.S.C. 1125 (a)

Brief description of cause:

Trademark Infringement and Unfair Competition

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
May 16, 2019

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

## PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes  
☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes  
☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

Notes :

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BARBARA J. SWAAB,

Plaintiff,

Case No. \_\_\_\_\_

-vs-

CALM.COM, INC.,  
a Delaware corporation,

Defendant.

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ARNOLD S. WEINTRAUB (P22127)  
THE WEINTRAUB GROUP, P.L.C.  
Attorneys for Plaintiff  
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**DECLARATORY JUDGMENT ACTION FOR NON-ABANDONMENT,  
TRADEMARK INFRINGEMENT, TORTIOUS INTERFERENCE WITH  
BUSINESS AND UNFAIR TRADE PRACTICES AND REQUEST FOR  
INJUNCTIVE RELIEF**

NOW COMES the Plaintiff, BARBARA J. SWAAB, by and through her  
Attorneys, THE WEINTRAUB GROUP, P.L.C. and ARNOLD S. WEINTRAUB, and  
for her Complaint against Defendant, CALM.COM, INC., states the following:

### **NATURE OF THE ACTION**

1. This action arises under the laws of the United States and, in particular, 28 U.S.C. §2201, 15 U.S.C. §1114, 15 USC §1117 and 15 U.S.C. §1125(a) as well as the laws of the State of Michigan.
2. Jurisdiction is proper in this district pursuant to 28 U.S.C. §1338.
3. Venue is proper pursuant to 28 U.S.C. §1391 and 28 U.S.C. §1167(a).

### **THE PARTIES**

4. The Plaintiff, BARBARA J. SWAAB is an Individual residing in the State of Michigan, County of Oakland, City of Orchard Lake.
5. Plaintiff is owner of the incontestable U.S. Trademark Registration No. 2,553,590, Registered on March 26, 2002 for the standard character mark “Take a Deep Breath,” which is valid and subsisting and which mark is currently in use in commerce (Exhibit A).
6. The Defendant, CALM.COM, Inc., is a corporation organized and existing under the laws of the State of Delaware, having a principal place of business at 140 2<sup>nd</sup> Street, Floor 3, San Francisco, California 94105.
7. Defendant is a multi million-dollar on-line enterprise that is in the business of downloadable mobile applications including relaxation and meditation apps. (Exhibit B).
8. Defendant conducts business in this State by offering its downloadable apps upgrades for a subscription price to upgrade its “free” apps (Exhibit C).

### **FACTUAL BACKGROUND**

9. Plaintiff hereby realleges Paragraphs 1 through 8 as if set forth in full herein.

10. In 2002, Plaintiff, who is a certified yoga instructor, began rendering relaxation and stress management instruction under the mark “Take a Deep Breath.”

11. Since 2002, Plaintiff has continuously used her trademark “Take a Deep Breath” and has advertised and promoted the services recited in the Registration through various media, including printed flyers, as well as on her website, [www.takeadeepbreathyoga.com](http://www.takeadeepbreathyoga.com). (Exhibit D).

12. Plaintiff teaches and has instructed and conducted relaxation and stress management yoga classes continuously since 2002 under her mark “Take a Deep Breath.”

13. Beginning in 2016, Defendant began using the identical mark “Take a Deep Breath” in connection with advertising, promoting and selling “mobile apps” in the field of “relaxation.”

14. On or about February 15, 2018, Defendant, having adopted the identical mark as Plaintiff, without authorization, more than fourteen (14) years after Plaintiff began using the mark, filed an “Intent to Use” trademark application. Defendant’s ITU application seeks registration of the mark “Take a Deep Breath” in multiple classes which, in essence, encircle all uses of the mark, except for the

services in IC041 in which the services provided by Plaintiff are classified (Exhibit E).

15. Defendant, through its counsel, in late 2019, contacted Plaintiff's counsel, seeking to acquire the Plaintiff's "Take a Deep Breath" trademark on the basis of an alleged "abandonment."

16. Plaintiff's counsel advised Defendant's counsel at that time that the mark was in use and had not been abandoned.

17. When rebuffed, Defendant instituted a proceeding before the Trademark Trial and Appeal Board seeking to cancel Plaintiff's trademark Registration on the basis of abandonment, while knowing full well that the registered mark was in use and had not been abandoned (Exhibit F).

18. In its Petition to Cancel, Defendant forthrightly states that it needs Plaintiff's mark, "Take a Deep Breath" in order to "obtain exclusive control over this mark and seek registration in IC 041."

19. The filing of the Petition to Cancel has created an actual case and controversy pursuant to the provisions of 28 U.S.C. §2201.

**COUNT I**  
**PLAINTIFF HAS NOT ABANDONED HER MARK**

20. Plaintiff hereby realleges Paragraphs 1 through 19 as if fully set forth herein.

21. Since at least 2002, Plaintiff, either directly or through her related company, TADB, Inc., has continuously used the "Take a Deep Breath" mark in connection with the services identified in the Registration. The mark has been

advertised and promoted and there has not been any period of non-use or abandonment for any three consecutive years and Plaintiff has never had any intent not to resume use.

22. Plaintiff presently maintains a website under the domain name, [www.takeadeepbreathyoga.com](http://www.takeadeepbreathyoga.com) which prominently displays the trademark “Take a Deep Breath” and which advertises the various types of yoga that she instructs (See Exhibit D).

23. Contrary to the Defendant’s assertions in its Petition to Cancel, Plaintiff has never abandoned the mark, thereby entitling the Plaintiff to a declaration that her trademark is still in full force and effect and has not been abandoned.

**COUNT II**  
**TRADEMARK INFRINGEMENT BY DEFENDANT**  
**UNDER 15 USC §1114**

24. Plaintiff hereby realleges Paragraphs 1 through 23 as if fully set forth herein.

25. Beginning in 2016, Defendant began advertising and promoting relaxation mobile applications and has marketed such under the trademark “Take a Deep Breath” which mark is identical to Plaintiff’s mark.

26. By its own averments before the Trademark Trial and Appeal Board, Defendant is seeking exclusive control over Plaintiff’s mark in order to fully monopolize the rights in and to this mark in the field of “relaxation” (See Paragraph

6 of Exhibit F/Petition to Cancel), and knowingly and willfully adopted and began using Plaintiff's mark in its business.

27. Defendant's knowingly willful advertising, promotion and selling "relaxation" mobile apps under a mark identical to Plaintiff's "Take a Deep Breath" mark has created a likelihood of confusion in the minds of the purchasing public in violation of 15 USC §1114.

28. Plaintiff has been damaged in an amount as yet to be determined.

29. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff's mark, "Take a Deep Breath" in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

**COUNT III**  
**UNFAIR COMPETITION – VIOLATION OF 15 USC §1125(a)(1)**

30. Plaintiff hereby realleges Paragraphs 1 through 29 as if fully set forth herein.

31. At least since 2016, the Defendant has advertised and promoted its relaxation mobile app under the mark "Take a Deep Breath" and such action constitutes a false and misleading representation of fact as is likely to cause confusion in the minds of the purchasing public in violation of 15 USC §1125(a)(1) by causing the purchasing public to believe that it is the owner of the trademark "Take a Deep Breath" in connection with its "relaxation" services.

32. Plaintiff has been damaged in an amount as yet to be determined.

33. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff's mark, "Take a Deep Breath" in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

**COUNT IV**  
**FALSE DESIGNATION OF ORIGIN – VIOLATION OF 15 USC §1125(a)**

34. Plaintiff hereby realleges Paragraphs 1 through 33 as if fully set forth herein.

35. By advertising and promoting its services and downloadable apps under the mark "Take a Deep Breath" for promoting its relaxation and stress management products and services while knowing that Plaintiff owns the Federal Registration for that mark, Defendant has wrongfully engaged in a false designation of origin by causing the purchasing public to believe that it is the owner of said mark and has undertaken this act which is likely to cause confusion in the minds of the purchasing public.

36. Defendant's wrongful acts as set forth herein are in violation of 15 USC §1125(a).

37. Plaintiff has been damaged in an amount as yet to be determined.

38. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff's mark, "Take a Deep Breath" in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

**COUNT V**  
**COMMON LAW UNFAIR COMPETITION**

39. Plaintiff hereby realleges Paragraphs 1 through 38 as if fully set forth herein.

40. Using its economic power, Defendant has undertaken willful and purposeful actions to impose economic hardship on the Plaintiff to subdue her and force her to submit to Defendant's desire to acquire her registration and to compel her to acquiesce to this because of the economic hardship that will be imposed upon her by seeking to protect her valuable trademark rights.

41. This overt activity by Defendant is in violation of the Unfair Competition Laws of the State of Michigan.

42. Plaintiff has been damaged in an amount as yet to be determined.

43. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff's mark, "Take a Deep Breath" in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

**COUNT VI**  
**COMMON LAW - UNFAIR COMPETITION**  
**TRADEMARK BULLYING**

44. Plaintiff hereby realleges Paragraphs 1 through 43 as if fully set forth herein.

45. As set forth hereinabove, contrary to the rights of the Plaintiff, Defendant has wrongfully adopted and used at common law the trademark “Take a Deep Breath” in connection with its “relaxation” business. Defendant now asserts and utilizes its economic power and its common law trademark usage in an attempt to force Plaintiff to turn over her rights in and to her registration and the mark “Take a Deep Breath” and as set forth in its Petition to Cancel, it needs the registration to fully monopolize the rights in and to this mark in the field of “relaxation”

46. Such action constitutes trademark bullying in violation of the common law of Michigan.

47. Plaintiff has been damaged in an amount as yet to be determined.

48. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff’s mark, “Take a Deep Breath” in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

49. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its usage of Plaintiff’s mark, “Take a Deep Breath” in connection with mobile relaxation applications, it will continue to injure and damage the reputation of the mark owned by Plaintiff.

**COUNT VII**  
**TORTIOUS INTERFERENCE WITH A BUSINESS OPPORTUNITY**  
**UNDER MCL §445.903**

50. Plaintiff hereby realleges Paragraphs 1 through 48 as if fully set forth herein.

51. In view of Defendant's stated attempt to monopolize the mark "Take a Deep Breath," if successful, such action precludes Plaintiff's ability to enjoy the natural expansion of the goods and/or services associated with her mark. Such action is in direct violation of the laws of the State of Michigan and, in particular, MCL §445.903(1)(a) and (c).

52. Plaintiff has been damaged in an amount as yet to be determined.

53. Plaintiff has no adequate remedy at law and, unless Defendant is enjoined from continuing its unauthorized usage of Plaintiff's mark, "Take a Deep Breath" in connection with relaxation products and/or services, it will continue to cause Plaintiff to suffer substantial irreparable harm.

#### **REQUESTED RELIEF**

WHEREFORE, Plaintiff, BARBARA J. SWAAB, requests that this Honorable Court find and order the following:

A. That Plaintiff has never abandoned her trademark registration for "Take a Deep Breath," U.S. Trademark Registration No. 2,553,590 which mark is valid and subsisting.

B. That Defendant has undertaken a willful and unlawful campaign seeking to divest Plaintiff of her lawful rights in and to her trademark;

C. That Defendant has tortiously interfered with Plaintiff's business;

D. That Plaintiff's mark is valid and subsisting;

- E. That Defendant has willfully infringed Plaintiff's trademark rights.
- F. That Plaintiff is entitled to an award of damages pursuant to 15 USC §1117.
- G. That Defendant's action is willful and that all damages be trebled and Plaintiff be awarded her attorney fees and costs in accordance with the statute;
- H. That Defendant be ordered to make a full accounting of all revenues generated since 2016 in connection with the sale of its downloadable relaxation and stress management apps.
- I. Defendant be preliminarily and permanently enjoined from using the mark "Take a Deep Breath" or any mark confusingly similar thereto for promoting its relaxation and stress management products and services or any goods related thereto.
- J. That this Honorable Court award such further remedies and relief it deems just and proper.

Dated: May 14, 2020

/s/Arnold S. Weintraub  
Arnold S. Weintraub (P22127)  
The Weintraub Group, P.L.C.  
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